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Supreme Court of the United States

OCTOBER TERM, 1967

No. 661, Misc.

EX PARTE
BOSTON & PROVIDENCE
STOCKHOLDERS DEVELOPMENT GROUP,
PETITIONER.

IN THE MATTER OF BOSTON & PROVIDENCE
RAILROAD CORPORATION, DEBTOR

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE MATTER OF BOSTON & PROVIDENCE
RAILROAD CORPORATION, DEBTOR

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

The petitioner moves the Court for leave to file the annexed petition for a writ of mandamus; and further moves that an order and rule be entered and issued directing the Honorable United States Court of Appeals for the First Circuit, and the Honorable Bailey Aldrich, Chief Judge, and the Honorable Frank M. Coffin and the Honorable Edward M. McEntee, Judges of the said Court, to show cause why a writ of mandamus should not be issued in accordance with the prayer of the annexed petition, and why the petitioner should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

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Attorneys for Petitioner

Supreme Court of the United States

OCTOBER TERM, 1967

EX PARTE
BOSTON & PROVIDENCE
STOCKHOLDERS DEVELOPMENT GROUP,
PETITIONER.

IN THE MATTER OF BOSTON & PROVIDENCE
RAILROAD CORPORATION, DEBTOR

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST DISTRICT

The Boston & Providence Railroad Stockholders Development Group prays that a writ of mandamus issue directing the United States Court of Appeals for the First Circuit to hear the petitioner's appeal, No. 6873, *Boston & Providence Railroad Stockholders Development Group* v. *Charles W. Bartlett, Trustee, et al.*

Decisions Below

The memorandum and order of the Court of Appeals dismissing petitioner's appeal, and that Court's memorandum and order denying rehearing, are not reported. They are appended hereto.

The District Court's opinion approving the I.C.C. plan of reorganization is reported at 260 F. Supp. 415. The

Commission's report approving the plan is printed at 327 I.C.C. 10.

Jurisdiction

Petitioner appealed to the Court of Appeals under 28 U.S.C. 1291. That Court's judgment dismissing the appeal was entered on March 29, 1967. Rehearing was denied on April 18.) There is no fixed time limit for a petition to this Court for a writ of mandamus. This Court's jurisdiction is invoked under 28 U.S.C. 1651(a).

Statutes

The District Court plan proceeding is governed by paragraph (e) of Section 77 of the Bankruptcy Act, 11 U.S.C. 205 (relevant portions are printed in the appendix to the brief appended hereto, p. A-3). The set-off procedure (affecting the old debentures) is provided by Section 68(a) of the Bankruptcy Act, printed *ibid.* at page A-2. The duty to file annual B&P reports as a carrier arises under Section 20 of the Interstate Commerce Act, 49 U.S.C. 20 (see portions printed *ibid.* p. A-2).

Question Presented

The sole question concerns just and provident administration of federal appeals, how far substantive justice should be suppressed to maintain judicial speed and a clear docket.

The milieu is equitable administration of a railroad by District Court A, and of the debtor railroad corporation and its owners by District Court B in another circuit. For many years the debtor and its railroad have languished in split federal court trusteeship, with no accounting.

The Interstate Commerce Commission approved a plan of reorganization requiring the debtor's stockholders to satisfy old debentures at expense to the stockholders exceeding a hundred dollars per share. The debentures have been repudiated and have never been proved as a claim against the debtor. In constructing the plan the Commission refused to pass on their validity, explaining (1) that it merely *assumed* validity, and (2) that the plan would be adjustable for the stockholders if District Court B should hold them invalid.

When its turn came to consider the plan, District Court B said that it was bound by the Commission's determination of a fair plan made according to legal standards. The court refused to pass on the validity of the debentures, but noted that the stockholders would benefit if they were held invalid.

An appeal for the stockholders denounced the debentures and attacked the plan. It also complained of District Court B's persistent refusals to *hear* proper applications for it to provide major relief through bankruptcy administration orders.

The Court of Appeals granted the appellant's motion for a nine-days extension of time to designate portions of the record for printing. But later the Court of Appeals (1) refused to accept a printed volume used by that Court for an earlier appeal on the same record—it required *reprinting;* (2) refused to allow appellant the same nine-days extension (or any extension whatever) for printing the record appendix (including the unexpected reprinting) and brief; (3) summarily dismissed the appeal for failure to meet the unextended printing deadline.

The appeal asserted that the plan would impose forfeiture on the stockholders amounting to many millions. The summary dismissal is precipitating a forced vote on the plan, and a forced sale of the debtor's railroad to the

owner of the debentures. Promoters of the plan have been assembling stock to control the vote.

In this special situation, on balancing the interests in having the First Circuit maintain judicial speed and an unburdened docket *versus* the interests in providing substantive justice and equitable judicial administration of the debtor and its estate, should this Court now direct the Court of Appeals to hear the appeal?

Statement

Petitioner is an active long-established group (the Development Group) of stockholders of the Boston & Providence Railroad Corporation (B&P).[1] Since 1938 B&P has undergone judicial administration under the equitable procedures of Section 77 of the Bankruptcy Act, 11 U.S.C. 205. In 1966 the Interstate Commerce Commission approved a plan for B&P's "reorganization" (actually liquidation) based on sale to The New York, New Haven & Hartford Railroad Company (New Haven). It certified the plan to B&P's reorganization court in Massachusetts, which approved the I.C.C. plan as made according to legal standards. The Development Group (petitioner) appealed. The Court of Appeals for the First Circuit summarily dismissed the appeal without hearing the merits.

I. Substantive Context of the Appeal

Appended hereto is a copy of petitioner's brief tendered as appellant to the Court of Appeals.[2] Its Statement of the Case (pages 5-31) describes the Development Group's fiduciary role and program (pp. 5-7). It describes B&P

[1] The group's chairman and counsel are two of B&P's six directors.

[2] Given an inability to print the entire Record Appendix for the Court of Appeals without an extension of time, the brief lacks citations to "RA" pages and was tendered in the page-proof form.

(pp. 8-10) and defines B&P's involvement with New Haven (pp. 10-21). Formerly New Haven operated B&P's lines as lessee and carrier, but in 1938 the old B&P lease was terminated by disaffirmance during New Haven's first Section 77 trusteeship in the federal court for the District of Connecticut. That court *retained* B&P's railroad properties and appointed its New Haven trustees to hold and operate them, no longer as lessee carrier, but on a *separate agency account for B&P*. (Brief, pp. 13-16.) An eroding controversy ensued over their attempt to divide the joint revenues of the New York and Boston Shore Line Route via Providence so as to allocate *all* joint earnings to their New Haven lines west of Providence and *none* to B&P.[3] But no accounting to B&P stands approved, and in 1947 they were replaced by the New Haven Company which stood in the trustees' shoes but suspended accounting to B&P altogether. Since 1947 the B&P owners have been denied any financial report or accounting statement for New Haven's continuing fiduciary operation of B&P lines for B&P—whether approved or unapproved. All accounting statements have been withheld; B&P has not received a nickel from the operation of its vital main-line railroad since 1938, and of course no rent.

By 1954 the joint undivided *net* railway operating income collected by New Haven[4] from operating their New Haven lines and B&P's lines exceeded $200,000,000. (See Brief, p. 19 based on Ex. 86.) In that year the Development Group was organized and set out to obtain divisions of the joint

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[3] They also allocated large additional revenues and earnings to a third carrier estate in the Shore Line Route, the New York Connecting Rail Road Company owning the Hell Gate Bridge Route at the New York end, to keep that estate fully solvent throughout.

[4] The Connecticut federal court appointed the New Haven Company as successor trustee to operate the B&P lines in 1947. The role fell to the court's trustees in New Haven's second Section 77 administration in 1961. (They operate B&P still in the first New Haven reorganization proceeding, which has not yet been closed.)

rates and fares for B&P fixed according to the national fair standard of Section 15(6) of the Interstate Commerce Act. (49 U.S.C. 15(6), printed in the appendix to the appended Brief, p. A-1.) New Haven procedurally frustrated the effort in the courts, but that effort nevertheless culminated (following three Congressional hearings) in the 1958 enactment of Public Law 85-515. The Connecticut court had justified its retention of the B&P properties and business by broad interpretation of a clause in Section 77(c)(6). P.L. 85-515 provided a clarifying amendment to (c)(6) affirming B&P's right to have its divisions measured according to the national fair standard. (The amendment is printed in the appendix to the appended Brief, pp. A-2, A-3. See also Brief, pp. 14-15, 19.)

Recognizing the 1958 enactment, the New Haven Company voted by resolution of its directors to buy B&P's properties for $16,500,000, a negotiated arms' length price that would pay the B&P stockholders $300 per share. (Brief, pp. 19-21.) That became ineffectual after New Haven returned to Section 77 trusteeship in 1961 (although even in 1962 the New Haven directors affirmed the $300 basis by incorporating it into their plan of reorganization for New Haven).

In 1963 the New Haven trustees launched a campaign to sell the New Haven lines to The Pennsylvania Railroad Company for inclusion in the proposed "Penn-Central" merger. The Development Group intervened in the I.C.C.'s Penn-Central Merger proceeding and demonstrated that the New Haven trustees, although touting a New York-Boston route, actually had a main line only as far east as Providence. (Effectively controlling the dual court procedures, they can sit on B&P and keep it bottled up, but they cannot deliver it to Penn-Central.)

Hence the New Haven trustees set out to buy up the B&P quickly. Having bought a large block of B&P shares

in 1962 at $105, they offered $110 in 1963 for the remainder.[5] The drastic markdown from the $300 arms-length valuation was explained away in terms of New Haven's hard luck. The trustees asked the lawyer for the Kynett (B&P) stockholders committee to undertake to obtain 2/3 acceptance by B&P's public stockholders. They had their reorganization judge in Connecticut (Judge Anderson) condition his approval of their $110 purchase by requiring 2/3 acceptance before the I.C.C. should *begin* its hearing on fairness. The committee was able to solicit authorizations from a majority to comply with Judge Anderson's "order" so as to avoid "forfeiture".

Against this formidable barnstorming, only the Development Group had the courage to oppose the $110 price before the I.C.C. The Group opposed on two main grounds:

> *First,* that the plan valuation of $9,500,000 for B&P's properties was an unjustified markdown from the recently agreed $16,500,000—particularly in face of great new opportunities for B&P to realize large proceeds from converting surplus real estate to non-railroad uses in the tremendous urban renewal and development. (See appended Brief, pp. 23-24.)
>
> *Second,* that the plan required the B&P stockholders to kick back $4,991,000 out of the skimpy $9,500,000 sale price, on the pretext of satisfying some old debenture bonds issued for $2,170,000 (with interest since 1938)—although the debentures appeared to have no valid existence.

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[5] The remainder is a majority, 20,770 shares. New Haven controls 15,918 additional shares, making a total of 36,688 shares held outside the B&P trustee's accounts. (His sinking fund for the debentures holds 3,272 shares and his general account holds 40 shares.) Over the past 136 years only 40,000 shares have ever been issued. Rate base valuation exceeds $1,000 per share. See appended Brief, p. 10.

The New Haven trustees met the *first* objection by agreeing in *principle* to let the B&P stockholders participate in the proceeds of an intensive jointly-administered 15-year program to convert B&P's surplus real estate interests to non-railroad uses, including express highway and rail transit uses. They conceded that the $110 price did not allow for such opportunties. The program, however, would follow acquisition of the properties by New Haven.

They made no concession against the *second* objection, which is based on New Haven's contractual obligation (recognized even by New Haven's reorganization court in 1939) to provide for payment of the debentures. (See appended Brief, pp. 15, 23, 31-44, A-1, B-3, B-5, B-9.) The debentures matured in 1938. Later New Haven acquired them by satisfying the holders. New Haven's modern unwillingness to recognize that the acquisition extinguished B&P's surety obligation on the debentures (or made it cancellable by set-off) is augmented by the fact that they fell into the United States Treasury as minor added collateral for certain bank loans to New Haven which the United States guaranteed. New Haven and federal collection lawyers agreed *inter se* (without B&P) that the debentures should be deemed valid, despite (1) the failure to prove a claim on them against B&P, and (2) the New Haven court's 1939 recognition of New Haven's principal obligation to provide for their payment itself. The federal contact with the debentures has been, and is being, used against B&P. See appended Brief, pp. 29-30.

The I.C.C. 1964 hearing on the $110 plan bogged down without the proponent coalition making its case. A reopened 1965 hearing considered an amendment presented by the coalition to implement the agreed real estate participation principle. Unfortunately that sound principle is largely vitiated by the fine type. (Recognition of this comes slowly against wishful thinking, but the bid price

of B&P shares on the Boston Stock Exchange has fallen from its high of 355 in 1966 to 220 last week.[6]

The Commission approved the plan with the vitiating amendment. (See appended Brief, pp. 23-26.) It refused to pass on the debentures, leaving that question up to the District Court in Boston, which has jurisdiction over B&P's reorganization, although still lacking access to B&P's railroad properties, business, and receipts.

The Boston court also refused to pass on the debentures, saying it was bound by the Commission's approval of a plan made on legal standards. Both the court and the Commission noted that the B&P stockholders would benefit from a decision that the debentures were invalid. By misreading the plan, however, the court asserted a compromise on the debentures, saying that the plan only requires the stockholders to pay $3,500,000 on the debentures instead of $4,991,000. See appended Brief, pp. 32, 47-49. Cf. 260 F. Supp. at pp. 418, 421.

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[6] The fine type would end the 15-year participation period in 1978. It provides for B&P properties to pass immediately to New Haven, and vests discretion in the New Haven management, although the Examiner saw New Haven's past reluctance to promote B&P real estate development as a "major impediment". See appended Brief, pp. 54-55.

The largest real estate opportunity now is to convert one of B&P's two routes north of Readville into a Southwest Boston expressway corridor. If that should produce as much as $8,000,000 ($200 per share) the fine type would put all proceeds into the treasury of the New Haven (which is formally proposing to invade its trust funds from real estate sales for use in defraying operating deficits).

New Haven would deduct its damages from the proceeds. It says its damage from the Southwest project will amount to $7,400,000. (This is on a different scale from its valuation of B&P properties as purchaser.) Such a deduction from the highway proceeds would cut the participation down from $200 to $15. (Actually less, because another clause limits the public stockholders to less than a true pro-rate share.)

Then a sort of *de minimis* clause would limit stockholders to participation in transactions producing at least $500,000 each ($12.50 per share).

See appended Brief, pp. 54-59.

Actually the plan requires the stockholders to surrender the full face amount of claim on the debentures, $4,991,000, plus interest on that amount from 1963, plus surrender of the sinking fund. See Brief, pp. 44-46.

On the side agreement between New Haven and the U. S., New Haven would pay $3,500,000 on its otherwise fully secured debt to the U. S., and would then reclaim the paper-tiger debentures. See Brief, pp. 47-49.

However, instead of being a compromise the plan requires full payment on the debentures—plus surrender of the collateral held in a sinking fund, and worth, say, $1,000,000. The total "compromise" thus considerably exceeds 100%. See Brief, pp. 44-46.

Given the plan's serious defects, the Development Group appealed to the First Circuit. See the questions presented (appended Brief, pp. 1-4).

The appeal also sought relief from the District Court's persistent refusal to hear motions to declare B&P's carrier status as required by the 1958 Act of Congress. (See Question 9 and the statutes printed in the Brief's appendix, pp. A-2, A-3.)

The appeal sought relief from the District Court's persistent refusal to hear the Development Group's petition asking the Court to hold a hearing on sale of the old main line via Forest Hills for the expressway and other public projects, and then to issue an order to provide such beneficial transfers. See Question 10 in the Brief, p. 4, and see p. 58.[7]

On September 14 the First Circuit heard oral argument on an appeal of the Commonwealth of Massachusetts over the Southwest Expressway corridor. The District Court had

[7] The difference between having the public funds go into B&P's treasury or into New Haven's treasury can be enormous. Receipt by B&P would render B&P eligible for extrication from bankruptcy, making its lack of insolvency plain.

refused to hold a hearing on the Development Group's petition for a hearing and order leading to sale of the corridor and elimination of unnecessary franchise obligations (through amendment to the plan of reorganization). In conference Judge Ford took the view that his ability to deal with that petition was impeded by the Commonwealth's absence.

Thereafter the Commonwealth asked for a declaratory judgment allowing it to take the B&P segment by eminent domain. The District Court isolated that request in a separate docket and denied the right, on strong opposition, not from the B&P owners (who did not participate) but from the New Haven trustees—again treating B&P's domain as their own. *Commonwealth of Massachusetts* v. *Bartlett*, 266 F.Supp. 390 (D.Mass. April 13, 1967.)

During this morning's argument Chief Judge Aldrich and the New Haven spoke as if the First Circuit had approved the plan of reorganization, chiding the Commonwealth for suggesting that it might be amended after more than 29 years. The Commonwealth had just called the Court's attention to our proposed amendments that were filed yesterday in the District Court, for elimination of the franchise obligations now encumbering the B&P segment and facilitating transfer to the Commonwealth. But our request that the District Court return the plan to the Commission with the proposed amendments probably faces more frustration—unless the Supreme Court will now grant this petition (or our accompanying alternative petition for a writ of certiorari).[8]

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[8] In October 1959 the District Court refused to grant a joint petition to return the Commission's 1954 plan with a proposed new plan to pay $300 per share (perhaps six times the value of the 1954 plan at that time)—although the petition was presented by all stockholder groups and was even supported by the New Haven Company itself.

II. How the Appeal Got Dismissed

Seen in context. The dismissal of the Development Group's appeal cannot be appreciated if seen only as an isolated incident to maintain judicial speed. It must be seen in context, as one more event in the 29-year procession of judicial frustrations and avoidances plaguing the venerable B&P estate and its long-suffering owners. Seen in context it becomes clear that judicial parsimony can sometimes go too far.

The district court's order approving the plan became final December 7, 1966. The presence of the United States as a party gave all parties 60 days to file a notice of appeal. F.R.C.P., Rule 73(a).

In order to get the record assembled in a workable location (which as a practical matter meant the office of the clerk of the appellate court) appellant accelerated its notice of appeal by filing on January 6, thirty days early. On February 15, the appeal was docketed in the court of appeals, although important record items (including the Commission hearings) did not come up until later.

Under court rules appellant's printed brief and record appendix became due on March 22, 1967. The brief could not be fully printed without the "RA" citations. The Record Appendix (RA) could not be fully printed by March 22. Without extension of time (duly requested) the printed documents could not be filed by March 22. So the Court of Appeals dismissed the appeal, with two decisions signed by Judge Aldrich.

No jurisdictional defect. Recently the Supreme Court has considered several cases where appellate courts have dismissed an appeal without hearing the merits. None of them has the deep consequences of this refusal, the deep frustration of substantive justice for so many persons. This case also differs from the usual procedural dismissal

in that here the appellant did not fail to perform any jurisdictional requirement.

The conflicting compensation proceeding. On January 16, 1967, the Commission opened hearings in two vital aspects of this litigation. In Washington it heard the parties on their petitions for compensation of expenses (including attorneys' fees) extending back as far as 1943. This was vital to appellant, not only to compensate counsel for work extending over 13 years, but also to reimburse members' loans and advances to the Group's B&P Development Fund, and to pay bank loans. And of course the Fund itself urgently required cash. Printing bills for more than $7,000 for the appellate court record on the 1954 plan are still to be reimbursed. Although borne largely by a cooperating attorney for another stockholder group, they indicate the problem of expense.

The B&P trustee did not oppose, but the New Haven trustees saw fit to send a seasoned trial lawyer whose incessant opposition dragged the compensation hearing into February and imposed the extraordinary necessity of briefs (contrary to the Commission's practice). Hence appellant's counsel had to submit briefs by March 20 running to 64 pages. A major subject of the briefs was the Commission's modern plan hearings, running to seven volumes—and those volumes were also the major subject of the record appendix that had to be printed in Boston by March 22. They could not reasonably be released for the appellate printer until the compensation briefs were substantially completed. Nor would the appellate court allow use of the original. Possibly New Haven counsel dragged out the compensation proceeding in order to keep appellant's counsel off the plan appeal.

The conflicting-Penn-Central-New Haven merger hearing. On January 16, the Commission opened a third conflicting hearing in New York, to set the terms for including the

New Haven and Boston & Providence railroad lines in Penn-Central's giant merger. At that hearing appellant presented a proposal to settle the B&P controversy with New Haven. The merger hearing is still going on.

Chronology of the Appeal

Given the squeeze of multiple proceedings, all in the same matter, adjustments were essential.

1. The First Circuit refused to grant a general extension of thirty days (which would only have used up the time allowed by the Federal Rules because the U. S. was a party) although it had granted such an extension in the 1957 plan appeal.

2. However, it granted an extension of nine days to file designations of the record for printing.

3. The First Circuit still insists on letterpress printing, and appellant engaged the Court's printer, who expressed the opinion that the first volume of the old plan appeal record could be used, (based on experience with the court's usage in other cases, especially the Northeast Airlines litigation). Appellant's counsel still held the copies reserved for the Supreme Court in 1957 (before the 1958 Act of Congress). But the major items for printing, the seven I.C.C. hearing volumes, could not be released to the printer until the compensation briefing was done. The printer named Monday, April 3, as his earliest deadline. At the suggestion of the Deputy Clerk, a motion for extension was revised to March 31, Friday—to allow time for briefs of appellees without putting the case over onto the June calendar. The Deputy Clerk confirmed usage of record volumes from earlier appeals as an occasional practice of the court.

4. On March 24 the court forbade using the old record

volume in this case and required reprinting. It refused to grant any extension of time for printing.

5. The printer then told the Clerk that the reprinting would make it impossible for him to meet the March 31 date, in view of other court commitments.

6. The Court of Appeals dismissed the appeal by memorandum of March 29, and denied rehearing with memorandum of April 18. Both memoranda are appended.

7. Throughout all this the Court denied appellant's requests for an oral hearing.

Reasons for Granting the Writ

1. Petitioner has incurred no jurisdictional defect. The denial of justice on the merits comes solely as a matter of the appellate court's abusive discretion.

2. The denial facilitates manipulation of the Section 77 proceedings to force on B&P and its beleaguered stockholders judicial confiscation for the benefit of their own operating fiduciary, the New Haven, which occupies their properties exclusively, has withheld all earnings from their business since 1938 and gives no accounting whatever.

3. Consider the debentures. They are worthless paper, by all legal standards. (The strongest argument made on the other side is that the B&P trustee has been so lax in not denouncing them as to estop the B&P stockholders.) They bear a clear legend of issuance under the old lease contract, which requires the former lessee (New Haven) to provide for payment of the principal and to pay the interest currently. B&P proved its claim therefor in New Haven's bankruptcy court in 1939. Later New Haven paid the debentures (and obtained important managerial benefit by doing so). Yet B&P's bankruptcy court *refuses to hear* our pending motion to reject New Haven's claim against B&P on the debentures. The Commission refuses

to pass on the question and relies on the court to do so in considering the plan. But the court, when it considers the plan, says that it is bound by the Commission.

This becomes a sort of shell game.

To show a compromise the court misrepresents the treatment of the debentures in a way that the S.E.C. would bar anyone from doing (other than a judge) in the decision that is to be the balloting information for voters. It says that the stockholders are only required to surrender $3,500,000 to satisfy the debentures—although the plan actually levies the full principal and interest against them plus a bonus of the sinking fund. Thus, the plan forces the B&P owners to surrender back to New Haven (or to New Haven's pledgee for New Haven's benefit) (a) $2,170,000 principal, *Plus* (b) interest of 130% or $2,821,000 through 1963, *plus* (c) interest at $224,595 per year (more than 10% of the principal) after 1963, *plus* (d) the entire sinking fund, worth, say, 50% as a bonus. The court calls it a compromise which, having been approved by the Commission, is therefore automatically valid. But the Commission approved *only* in the event that the debentures are valid, which the court won't say. The court of appeals refuses to pass on the matter and proceeds to cut off the stockholders from any adjudication. Hence the Commission has now had the decisions printed up in the balloting prospectus. On July 31 the Commission refused to postpone the vote for Supreme Court review.

3. The debentures manipulation more than warrants this Court's stepping in and directing the Court of Appeals to hear the appeal. An additional element is the New Haven's fiduciary breach, buying the debentures at a large discount and then levying against its managed B&P estate for the full amount including profit.

4. Consider the real estate participation. The District Court found that an indenture of equitable charge provides

fair protection for the stockholders. The indenture was not offered in evidence, and it has never been approved by the New Haven. Actually it is unworkable and will frustrate the B&P stockholders and the public interest of the Commonwealth of Massachusetts and the City of Boston as demonstrated by the New Haven's opposition to the Commonwealth over the Southwest Expressway in the Court of Appeals this morning.

5. The memoranda of the Court of Appeals say no word about what is fair to the stockholders. They impute some sort of dereliction to counsel for the appellant. Yet surely the dereliction is on the other side. The appended Brief shows which side is the true fiduciary.

6. The appellate court emphasizes a latter-day interest of haste, and the importance of not running a risk that *appellees* might delay the argument from May until June by needing an extension of time (which the Court apparently would have granted). Therefore appellant may *not* have any extension.

7. The court charges counsel with a duty to engage more counsel. But that only goes to mould the legal profession into a trust of the big firms. Counsel was indeed forced by the pressures to engage a Boston firm to help on the compensation. That was unexpectedly arduous; the firm was not available for the appeal. With all admiration for the established big firms, creative solutions and the maintenance of democracy in this land still require dedicated individual practitioners. It will be a sorry day when they are driven to the litigative fringe.

8. What is all this interest in speed at the expense of justice? It is well said that "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure". *Duke Power Co.* v. *Greenwood Co.*, 299 U.S. 259, 268. "In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate

speed takes time. But it is time well spent." Frankfurter, J. in *First Iowa Coop.* v. *Power Commission,* 328 U.S. 152, 188 (1945) (dissenting opinion). It has even been said that "Speed and hurry ought to be antipodes of judicial behavior." Learned Hand, J., in *California Apparel Creators* v. *Wieder of Calif.,* 162 F.2d 892, 903 (2 Cir. 1947).

Finally

This is the second B&P plan to reach the court of appeals. The refusal of the courts to grant relief from the confiscatory plan of 1954 was disillusioning, but Congress came to the rescue in 1958, which led to the $300 basis of 1959. That fell apart after New Haven failed in 1961. Now the B&P owners have a last opportunity to realize something approaching fairness by converting their properties to new uses.

When the first appeal was coming on in 1957, the former chief justice was informed of its imminence. He expressed himself to one of the undersigned counsel in unforgetable repugnance over the prospect of having to grapple with the B&P tangle. He said that he had told the district judge to get it off the docket.

It may be repugnant to hear it, but it is more repugnant not to hear it. With the debentures finally exorcised, B&P will be in a position to work out its destiny. After all B&P's stock did reach $355 last year, before the defects in the plan were appreciated. The values are there. B&P's whole "insolvency" is abusive.

Conclusion

This petition shows that relief is not obtainable in the other courts or by the normal appellate process. The Court of Appeals has departed from this Court's modern standards of judicial providence so far that supervisory intervention is required.

Petitioner is not asking this Court to review on the merits, but only to issue a simple *per curian* order to hear the appeal.

Respectfully submitted,

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